

The ALJ concluded the decedent's death arose out of and in the course of his employment with respondent. He further found that Sadia Khan was decedent's surviving legal spouse and therefore entitled to the death benefits provided for in K.S.A. 44-510b(a) and 44-510b(f).

The respondent has requested review of the ALJ's decision and asserts two points of error. First, respondent argues that decedent's accident occurred at a point in time when decedent was not working. Although the decedent was assigned to an out-of-town project in Houston, Texas, the automobile accident that took his life occurred at approximately 11:00 p.m. at night while decedent was driving with a co-worker and a friend to an unknown destination. Thus, respondent maintains the accident did not arise out of and in the course of decedent's employment and the ALJ's Award should therefore be reversed.

Second, respondent argues that the evidence failed to establish that Sadia Khan was decedent's lawful wife. Accordingly, the ALJ erred in awarding her death benefits afforded under the Kansas Workers Compensation Act (Act) and the Award should be reversed.

Claimant contends the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts in this case are well known to the parties and will not be unnecessarily repeated herein. Decedent was a radio frequency engineer hired by respondent to survey the cell phone tower coverage in various markets in the United States. Decedent had no permanent work site¹ instead traveling to distant locations. When he was assigned to the temporary location, respondent would pay for decedent to travel to the city either by a rented van or by an airplane, pay him a per diem for each day he was away from home, and a vehicle (including gas) would be provided² while his work assignments would be emailed to him. The program manager testified that travel was necessary in this job.³

According to decedent's direct supervisor, Rohan Shah, decedent and his co-worker were "on call" if needed and scheduled to work "on demand" depending on the schedules dictated by respondent's customers, Ericsson or T-Mobile. Working 60 hours per week was not out of the ordinary.⁴ Another manager described their status as "standby", waiting

¹ Shah Depo. at 12, 17.

² R.H. Trans. at 25; Shah Depo. at 51.

³ Dhawan Depo. at 37, 48, 55.

⁴ Shah Depo. at 125.

for assignments. It was decedent's habit to work long hours in order to complete the project so he could return home to Wichita, Kansas.

Decedent and his co-worker were assigned computers that were used in the collection of the radio frequency data. Their job could not be performed without at least one computer. Additional wires and a converter were also required in the job. The computer would store the information gathered during the decedent's drive pattern and then that information would be transmitted to the customer. Decedent would store the computer and the other equipment in his hotel room when it was not being used.⁵

At approximately 3:30 p.m. on August 9, 2006, decedent spoke with Sadia Khan, the woman decedent wed in a Muslim marriage ceremony. According to her, he indicated he was working that evening. Decedent called his sister at approximately 8:25 p.m. that same night, and told his sister he was working and the two talked about a bill that needed to be paid. Shortly thereafter, decedent spoke to Rohan Shah, his supervisor, at approximately 10:00 p.m. that evening. Rohan Shah testified that decedent was not working that day but that the two of them spoke about the work that would be done on August 10, 2006. There is, however, a copy of an email within the record that is dated August 9, 2006 which outlines the cell phone towers that were available in the area. The email itself does not indicate whether claimant was to survey those towers immediately. Rather, Mr. Shah indicates that was simply an informational email.

Decedent was killed in a catastrophic automobile accident at approximately 11:00 p.m. on August 9, 2006. Decedent, along with a co-worker and a friend, were headed away from their hotel when they were struck by a drunk driver. The van in which they were driving was completely demolished and caught fire. The record contains photos which show the devastation. Nevertheless, it is possible to see computer wires and cords that were found inside the van. There was other work equipment that was found in the vehicle, although no computer was apparently found at the site.

After the accident, Rohan Shah and Vivek Dhawan went to decedent's hotel room to retrieve the work equipment. Mr. Dhawan says that two computers were found in decedent's room and were given to Rohan Shah.⁶ Mr. Shah testified that one computer was found in decedent's room.⁷

A claim was filed by Sadia Khan, as the surviving spouse and sole beneficiary under K.S.A.44-510b. At the regular hearing, only two issues needed to be decided. Respondent denied that decedent's automobile accident arose out of and in the course of

⁵ R.H. Trans. at 81.

⁶ Dhawan Depo. at 14-15.

⁷ Shah Depo. at 70.

his employment. Respondent contends the accident occurred while decedent, his co-worker and a friend were on a personal trip, wholly unconnected to decedent's work activities. Respondent also denied that Sadia Khan was decedent's legal wife. Specifically, respondent contends that decedent and Sadia never registered their marriage documents with the appropriate authorities following their religious ceremony in England.

The ALJ considered all the evidence and concluded decedent's injury did, in fact, arise out of and in the course of his employment. The Award makes it clear that the ALJ was persuaded that decedent's temporary assignment to Houston, Texas required him to be on "standby" while out of town and work long hours, using a computer while driving on the roads to confirm cell phone coverage.⁸ The ALJ also concluded that "any assumptions about whether or not there was a computer inside [the vehicle] at the time of the accident [is] guesswork."⁹ He went on to find Sadia Khan was decedent's lawful spouse and awarded her sole survivor benefits under K.S.A. 44-510b(a) and 44-510b(f).

It is the claimant's burden of proof to establish her right to an award of compensation and to prove those conditions on which her right depends.¹⁰ This would include the issue of whether claimant was the decedent's "legal spouse". K.S.A. 44-510b(a) and (b) contemplates payment of survivor's benefits to a legal spouse and dependent children. If there are no dependent children (as here) all of the benefits would go to the surviving legal spouse.

Based upon the evidence contained within this record the Board finds respondent's denial of Sadia Khan's status as the legal spouse is disingenuous. The uncontroverted evidence is that on March 23, 2005 decedent and Sadia were married in a religious ceremony, consistent with their Muslim faith. All of the evidence within the record supports her contention that they were married, including decedent's own blood relatives. Sadia came to live with decedent and his family in Wichita, Kansas. Decedent, as the eldest son, supported her and the balance of his family, in typical Muslim fashion. Although Sadia admits that no paperwork was filed with any governmental office, she considered herself married to decedent as did his family.¹¹

Moreover, under these facts and circumstances, the Board also finds that Sadia Khan and decedent were married under common law. The three well-known essentials of a common law marriage are 1) the capacity to marry, 2) the parties must mutually agree to be presently married, and 3) a mutual holding out of each other as husband and wife to

⁸ ALJ Award (Feb. 2, 2009) at 3.

⁹ *Id.*

¹⁰ *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

¹¹ R.H. Trans. at 83; Ali Khan Depo. at 22.

the public.¹² Here, each of those elements have been met. The two were married in an apparently elaborate religious ceremony and went on to live together in the family unit in Wichita, Kansas and elsewhere, depending on the deceased's work assignments. Sadia believed she was married to decedent as did his family. From all indications in the record the two held themselves out to be husband and wife. He paid for her needs as well as that of the household.

Although respondent points to the lack of filing of paperwork in a government office as support for its contention that the two weren't legally married, the record contains no evidence that suggests that any paperwork *should* have been filed in order to transform their religious union (which respondent concedes occurred) into a legal one. Respondent further suggests that the lack of any tax records indicating decedent and Sadia were married supports the lack of any valid marriage is equally unpersuasive. Sadia resided here for short periods of time, returning to care for an ailing father in England. Nonetheless, she called decedent a number of times per day and traveled to Kansas when she could, even staying with her husband while he was assigned out of town for his projects, riding in the van with him while he took cell phone tower readings. Decedent paid for all of her needs as well as those of his family, again in the Muslim tradition. They all resided together in Wichita, Kansas.

There is simply no evidence within this record that would support the contention that Sadia and decedent were not married as she claims, regardless of the lack of any formal filing with any sort of governmental unit. That portion of the Award is, therefore, affirmed.

The Board is likewise unpersuaded by respondent's contention that decedent's accident did not arise out of and in the course of his employment with respondent. An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the

¹² *In re Adoption of X.J.A.*, 284 Kan. 853, 166 P.3d 396 (2007).

¹³ K.S.A. 2006 Supp. 44-501(a).

¹⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.¹⁵

Kansas has long recognized as compensable an injury suffered during travel to the job when the operation of a motor vehicle on public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.¹⁶

It is worth noting that this factual situation is unlike the one present in *Butera*.¹⁷ In *Butera*, the claimant was injured in an automobile accident while traveling from his temporary home to his assigned work site. Here, decedent was assigned to the various locations for shorter periods of time than in *Butera* and once assigned to that location, would spend the entire workday driving a vehicle and taking radio frequency readings. Thus, travel was part and parcel of his job.

Indeed, respondent concedes that travel was an inherent component of the job both in terms of traveling to the distant job site and again as the job was being performed. But respondent nonetheless argues that the accident occurred at 11:00 p.m., when decedent was not working and therefore, did not arise out of and in the course of his employment.

The Board has carefully reviewed the entire record and finds the ALJ’s Award should be affirmed. Like the ALJ, the Board is persuaded that decedent’s accident arose out of and in the course of his employment. The Board finds the decedent was working on the night of August 9. The debris remaining from accident contained computer wires and other equipment which supports the conclusion that the decedent was working at the time of his death. Although there is an inconsistency in the testimony with respect to the number of computers found in decedent’s room after the accident, the Board believes the greater weight of the evidence (based on decedent’s past history of removing the equipment from the van when not in use) supports the conclusion that decedent’s computer was in the vehicle at the time of the accident. It was not unusual for decedent to work late at night and to take friends along during the ride to test radio frequencies. Decedent told both his wife and his sister he was working that night. And while it is true

¹⁵ *Id.*

¹⁶ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P. 2d 556 (1984).

¹⁷ *Butera v. Fluor Daniel Constr. Corp.*, 31 Kan. App.2d 108, 61 P.3d 951 (2003).

that Mr. Shah testified that decedent wasn't working on August 9, decedent had been sent an email that day that delineated cell phone towers that were part of the project and to be tested. Even Mr. Shah believed decedent was one of the better workers on the project, getting his work done in a timely fashion. It seems consistent with all that is known of him that he would be working on the night of his accident in the hopes of completing the project and returning home to his family.

For these reasons, the Board finds the ALJ's Award should be affirmed in all respects. Claimant, Sadia Khan, is decedent's legal spouse and sole dependent. She is entitled to the benefits afforded to her under the Act.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 2, 2009, is affirmed.

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR OF Sadia Khan, claimant's surviving spouse, against the respondent, Mobilecomm Professionals, Inc., and the insurance carrier, Hartford Accident & Indemnity for an accident that resulted in claimant's death on August 9, 2006.

Subject to the provisions below and K.S.A. 44-510b, payment shall be paid to Sadia Khan, the claimant's surviving spouse as follows:

From the date of claimant's accident and death, August 9, 2006 to August 28, 2009, the claimant's surviving spouse is entitled to a lump sum of \$40,000, followed by 159.86 weeks of compensation at a rate of \$483.00 per week in the amount of \$77,212.38 for an amount due and owing of \$117,212.38.

Thereafter, claimant's surviving spouse is entitled to 274.92 weeks of compensation at a rate of \$483.00 per week in the amount of \$132,786.36 and for a total amount due not to exceed \$250,000 and when such total amount has been paid the liability of the employer for any further compensation under K.S.A. 44-510b shall cease.

The respondent and insurance carrier are also ordered to pay or reimburse claimant's surviving spouse for funeral expenses incurred.

IT IS SO ORDERED.

Dated this _____ day of September 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bradley A. Pistotnik, Attorney for Claimant
 Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
 Thomas Klein, Administrative Law Judge